

No. 21,169

In the
United States Court of Appeals
for the Ninth Circuit

A. BATES BUTLER, Trustee of CONSTRUCTION
MATERIALS Co.,

Appellant,

vs.

PACIFIC NATIONAL INSURANCE COMPANY, nka
TRANSAMERICA INSURANCE COMPANY,

Appellee.

Petition for Rehearing

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STATEMENT OF GROUNDS FOR REHEARING

Appellee petitions for rehearing in the above-entitled appeal on the following grounds:

I

The Court of Appeals erred in applying the rule of *Kennedy v. Powell*, 366 F.2d 346 (9th Cir. 1966), holding that a cash bond deposited by the bankrupt to obtain a contractor's license was property of the bankrupt and vested in the trustee, because the funds in the instant case, unlike such cash deposit, never were the property of the bankrupt

but were retained by the State of Arizona for the benefit of unpaid laborers and materialmen, to whose position appellee is subrogated following payment of the bankrupt's obligations, and no property interest therein ever could vest in the estate of the bankrupt, as pointed out on page 3 of the Court's opinion, until it paid such laborers or materialmen, which it failed to do. See *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962), on which this Court relies in establishing the priority of the unpaid materialman over the contractor's trustee in bankruptcy.

II

The Court erred in reversing the judgment of the district court in favor of appellee and remanding the case for pro rata distribution of the funds by the trustee among unpaid laborers and materialmen for whose benefit the funds were retained because the record herein discloses that all creditors of that class have been paid by appellee, which thereby was subrogated to all such claims, rather than that of The Ashton Company alone. See Page No. 50, Transcript of Record on Appeal, including the following exhibits: Plaintiff's Exhibit 14, reciting that the only claims on file with the State of Arizona were those of Babby Building Specialties, Inc., Commonwealth Electric Company of Arizona and The Ashton Company; Plaintiff's Exhibit 17, receipt and assignment to appellee of the claim of Babby Building Specialties, Inc., for the sum of \$385.78; Plaintiff's Exhibit 18, receipt and assignment to appellee of the claim of Commonwealth Electric Company of Arizona for the sum of \$1,201.50; Plaintiff's Exhibit 8, receipt and assignment to appellee of the claim of The Ashton Company for the sum of \$31,000.00; and Plaintiff's Exhibit 1, appellee's surety bond in the penal sum of \$53,587.57, for the express benefit of "any and all creditors . . . for any and all claims, bills, accounts, and demands made and contracted and incurred

for or on account of labor or services performed, materials, supplies, or provisions furnished . . . in the performance of said contract . . .”; reflecting not only that all claims totaling \$32,587.28 were paid by appellee but that a balance of \$21,000.00 of the penal sum of the bond was not exhausted, for lack of additional claims by creditors of the class secured under Ariz. Rev. Stat. Sec. 34-221(A)(3).

Respectfully submitted,

CHANDLER, TULLAR, UDALL & RICHMOND

By JAMES L. RICHMOND

Attorneys for Appellee

I certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

JAMES L. RICHMOND

